NAVIGATING THE INS AND OUTS OF COVERAGE FOR ADDITIONAL INSUREDS: IT'S COMPLICATED

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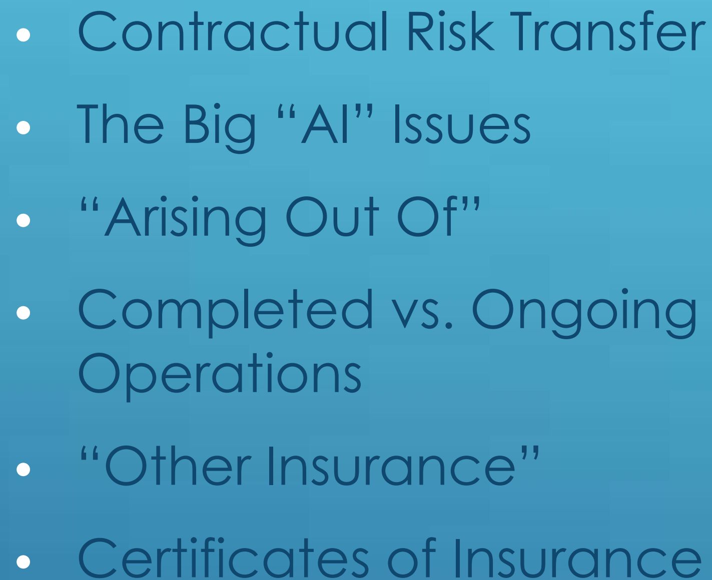
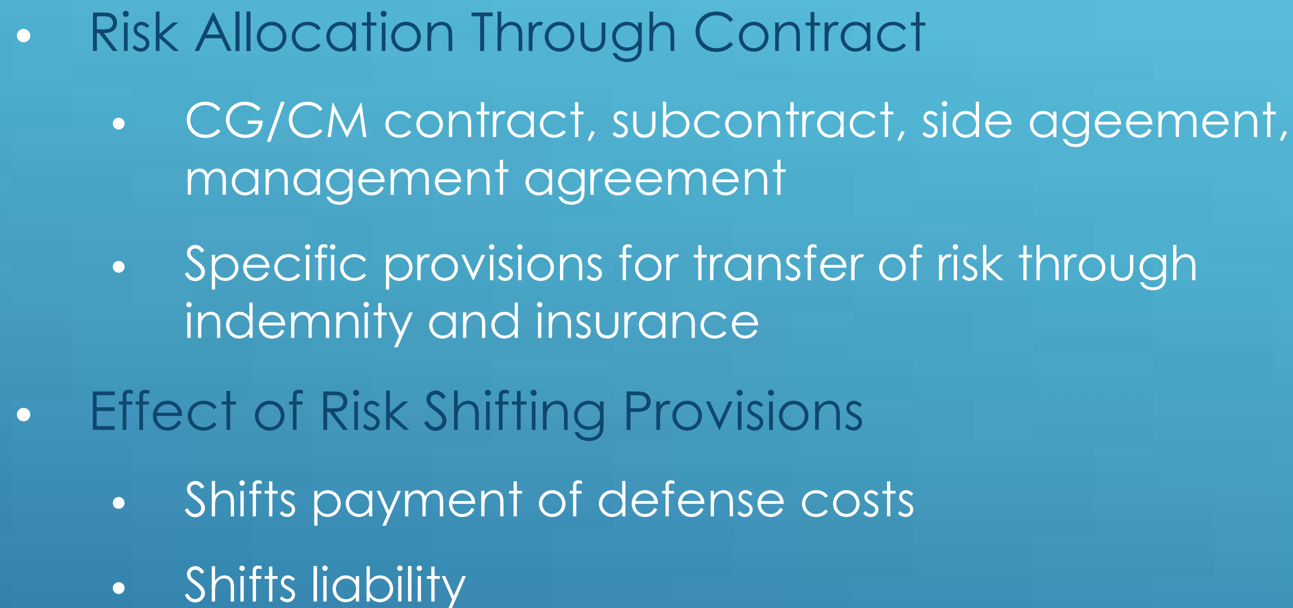
OVERVIEW



CONTRACTUAL RISK TRANSFER



- Risk Allocation Through Contract
  - CG/CM contract, subcontract, side ageement, management agreement
  - Specific provisions for transfer of risk through indemnity and insurance
- Effect of Risk Shifting Provisions
  - Shifts payment of defense costs
  - Shifts liability

CONTRACTUAL RISK TRANSFER INDEMNIFICATION VS. AI

- State law determines enforceability of indemnity agreement.
- Where no anti-indemnity statute applies, indemnity agreements are enforceable where they reflect an agreement by both parties to transfer liability, including indemnification for the indemnitee's sole negligence.
  - *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705, 708 (Tex.1987).
- Risk transfer through insurance is generally not subject to the same rules, and generally not limited to coverage for liability assumed via an indemnity provision.
  - *Gilbane Building Co. v. Admiral Ins. Co.*664 F.3d 589 (5th Cir. 2011)

CONTRACTUAL RISK TRANSFER THROUGH INDEMNIFICATION

- Construction Agreements Before 1/1/2012
  - Subject to Express Negligence Test
    - Intent to transfer risk must be clearly expressed
    - Indemnity provision must be conspicuous
- Construction Agreements After 1/1/2012
  - Prohibits indemnification for negligence of indemnitee

TRANSFER OF RISK THROUGH ADDITIONAL INSURANCE

- Before 1/1/2012
  - No restrictions.
  - Not subject to requirement of fair notice.
- Construction Agreements After 1/1/2012
  - Prohibits transfer of risk through additional insurance for additional insured's own negligence.
  - Assumption of risk for vicarious liability is still permitted.
  - Questions:
    - Non-delegable dutes;
    - Joint and several liability.

INSURANCE COVERAGE FOR CONTRACTUAL RISK TRANSFER

- Coverage for indemnity obligation is through exception to exclusion 2.b
  - Liability assumed by the insured under an "insured contract"
- Generally does not intersect with coverage through additional insurance
  - Exception when coverage for additional insurance is limited by indemnity provision
  - In that event the *name insured's* liability for breach of contract might be covered because the agreement to procure insurance is an "insured contract
- Duties owed by insurer flow directly to insured, not indemnitee
  - Possible exception when insurer controls the defense pursuant to Supplementary Payments provision

Deepwater Horizon v. Ranger v. Ranger Ins., Ltd.

- Transocean owned the *Deepwater Horizon*, a semi-submerged offshore oil unit, operating under a Drilling Services Agreement with BP.
- The unit sank in 2010.
- Transocean agreed to indemnify BP and to procure liability insurance naming BP as an additional insured.
- Transocrean procured primary and excess liability policies. The policies at issue provided insurance to:
  - Any person or entity to whom the "Insured" is obliged by any oralor written "Insured Contract" (including contracts which are in agreement but have not been formally concluded in writing) entered into before any relevant "Occurrence", to provide insurance such as is afforded by this Policy..
  - The term "insured contract" was defined to mean an agreement under which Transocean had agreed to assume the "tort liability" of another. "Tort liability" was defined to mean a "liability that would be imposed by law in absence of the contract or agreement."
- The indemnity provision in the Drilling Services Agreement did not apply to BP's negligence.

Deepwater Horizon v. Ranger v. Ranger Ins., Ltd.

- Ranger argued that coverage for BP was limited to the extent of liability assumed under the Drilling Services Agreement (i.e. coverage did not apply to BP's negligence because the indemnity agreement did not apply to BP's negligence.
- Transocean argued that under *Evanston v. Atofina* the additional insurance provided to BP was not limited to the extent of liability assumed under the Drilling Services Agreement.
  - In *Evanston v. Atofina* the Supreme Court held that coverage under an additional insured endorsement was not limited by the following language in an underlying contract between the named and additional insured:
    - Employee of Triple S drowned; the heirs sued Atofina;
    - Atofina was operating under a Drilling Contract with Triple S;
    - Triple S agreed to indemnify Atofina for its sole negligence;
    - The Drilling Contact between Atofina and Triple S also required Triple S to insure Atofina under the following provision: Atofina, and its parents, subsidiaries and affiliated companies, and their respective employees, officers and agents shall be named as additional insured in each of [Triple S's] policies, except Workers' Compensation; however, such extension of coverage shall not apply with respect to any obligations for which [ATOFINA] has specifically agreed to indemnify [Triple S].
    - Atrofina did not seek indemnification from Triple S under the agreement;
    - Evanston argued that the policy did not provide insurance for Atrofina because Triple S had expressly assumed the obligation to indemnify Atofina.
    - The Court held that coverage under Evanston's policy was separate from Triple S's obligation to indemnify Atrofina and that coverage was not limited by the Drilling Contract.

Deepwater Horizon v. Ranger v. Ranger Ins., Ltd.

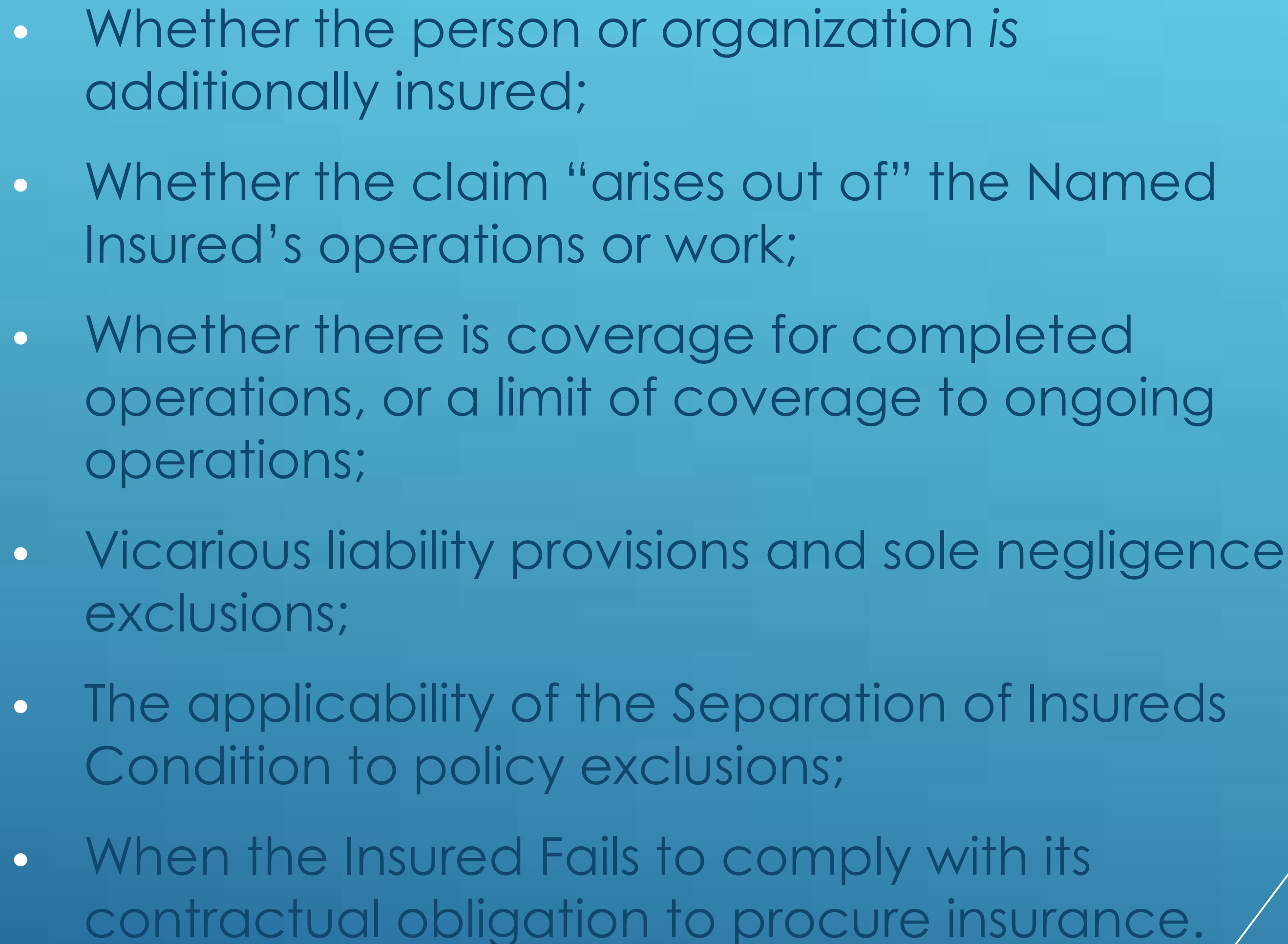
- Whether *Evanston Ins. Co. v. ATOFINA* compels a finding that BP is covered for the damages at issue, because the language of the umbrella policies alone determines the extent of BP's coverage as an additional insured if, and so long as, the additional insured and indemnity provisions of the Drilling Contract are "separate and independent"?

- Whether the doctrine of *contra proferentem* applies to the interpretation of the insurance coverage provision of the Drilling Contract under the *ATOFINA* case, 256 S.W.3d at668, given the facts of this case?
  - i.e. is the a "sophisticated insured" exception to the *contra proferentum* rule?

COVERAGE FOR ADDITIONAL INSUREDS

- Who is an Insured – Section II
  - Named Insured
  - Anyone else who qualifies expressly under Section II
  - Blanket – where required by written contract (may include “contractor” and “owner” under a construction agreement).
  - Endorsement specifically identifying the additional insured
- Differences in Policy Application
  - Conditions
    - AI is required to give notice of a “suit”
    - AI is required to forward “suit” papers
    - Exclusions - some apply to “you,” some apply to “the insured”, some apply to “any insured”

MOST COMMON ADDITIONAL INSURED ISSUES



- Whether the person or organization *is* additionally insured;
- Whether the claim "arises out of" the Named Insured's operations or work;
- Whether there is coverage for completed operations, or a limit of coverage to ongoing operations;
- Vicarious liability provisions and sole negligence exclusions;
- The applicability of the Separation of Insureds Condition to policy exclusions;
- When the Insured Fails to comply with its contractual obligation to procure insurance.

IS THE ADDITIONAL INSURED ADDITIONALLY INSURED?

The policy provides coverage "where required by written contract"

Can use the underlying construction agreement to determine party's status as additional insured (and scope of work) for purposes of determining the duty to defend.

The policy provides coverage to a party that is specifically identified.

Cannot use the underlying contract for any purpose in determining the duty to defend.

But consider the "liberal interpretation" and "reasonable assumption" rules.

ARISING OUT OF

- Broader than “caused by” or “resulting from.”
- Causal “but for” connection: not a fault-based analysis.
  - Includes the negligence of the additional insured (unless otherwise restricted).
  - No requirement of actual fault on the part of the named insured.

VICARIOUS LIABILITY AND NEGLIGENCE EXCEPTIONS

- Older forms not restricted: Applicable to liability arising out of named insured's work or operations;
- Newer forms restricted
  - Applicable to liability arising out of insured's work or operations, provided the loss or damage is caused in part by the named insured;
    - *American Surplus Lines Ins. Co. v. Crum & Forster Specialty Ins. Co.*, (endorsement applicable to damage caused "in whole or part" by the named insured and excluding sole negligence was not limited to vicarious liability but applied to proportionate fault of AI).
  - Exclusions for sole negligence;
  - Exclusions for any negligent act, error or omission of the additional insured;
  - Applicable to additional insured's "general supervision" of named insured's work.

ENDORSEMENTS APPLICABLE TO ONGOING OPERATIONS

- "Completed Operations Coverage" is not an insuring agreement, but only determines what exclusions apply and in the case of an additional insured, whether coverage is provided for *damage* that occurs after operations are complete.
- 1986 Version (CG 20 10 11 85)
  - Applies to liability arising out of "your (the named insured's) work."
  - "Your work" includes both ongoing and completed operations.
- 1993 Version (CG 20 10 10 93)
  - Applies to liability arising out of "Your (the named insured's) ongoing operations performed for the additional insured
  - Ongoing operations is not defined but has been judicially interpreted in a manner consistent with the definition of "Products-Completed Operations Hazard" in the standard policy form.
- Question: The interplay between coverage that applies to "ongoing operations" and the trigger of coverage:
  - Exposure theory;
  - Manifestation theory;
  - Injury in-fact;
  - Continuous.

(Hint: Coverage still applies to liability "arising out of" named insured's ongoing operations.)

ENDORSEMENTS APPLICABLE TO ONGOING OPERATIONS

CG 20 10 07 04

"Section II – WHO IS AN INSURED is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to *liability* for 'bodily injury' or 'property damage' or 'personal and advertising injury' *caused in whole or part* by:

1. Your acts or omissions; or
2. The acts and omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

With respect to the insurance afforded to these additional insureds, the following exclusions apply:

This insurance does not apply to 'bodily injury' or 'property damage' ***occurring after***:

1. All work, including materials, parts, or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the insured has been completed; or
2. That portion of 'your work' out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

LESS COMMON ENDORSEMENTS

- CG 20 26 07 04 – Additional Insured – Designated Person or Organization
  - Follows GG 2010; 2004 revision does not include the completed work exclusion f the CG 20 10 07 04 form.
- CG 20 33 07 04 – Additional Insured – Owners, Lessees and Contractors
  - Includes provision that the person(s) or organization(s) status as an additional insured ends “when our operations for that insured are complete.”
- CG 20 37 07 04 – Additional Insured – Owners, Lessees and Contractors
  - Expressly provides coverage for completed operations

SPECIFIC ADDITIONAL INSURED ENDORSEMENT

- Does not apply unless claim or "suit" is presented against precise entity named
- Question: Whether named insured must be implicated in lawsuit or not
  - Yes: Unintentional imposition of limitation of vicarious liability.
  - No: Policy must be read as a whole, including rating and classification and considered in light of "liberal interpretation" and "reasonable assumption" rules.

OTHER INSURANCE

- Priority recognized unless "other insurance" provisions are "mutually repugnant"
- Conflict between federal and state law:
  - Hardware Dealers
  - Royal Globe
    - Essentially holds that clauses are repugnant *because* both policies would provide coverage "but for" the other.
    - Criticism noted in
- *American States Ins. Co. v. ACE Ins. Co.*, No. 12-20783, 2013 WL 6069431 at *2-3 (5th Cir. Nov. 19, 2013)(unreported). :
  - Holding that where the primacy coverage under both policies was dependent upon ownership of auto, the first part of the *Hardware Dealers* test could not be met because coverage was dependent upon an extraneous fact (ownership), not the existence or non-existence of another policy.
  - Implications for primacy clauses that are contained in endorsements that apply "where required by written contract."
- Allocation and subrogation rights:
  - Defense
    - *What about "no duty to defend" when coverage is excess provision?*
  - Indemnity
    - *Lennar Corp*
    - *What are the subrogation rights under the vertical exhaustion rule?*

OTHER ISSUES AND CONCERNS

- When AI coverage exists and there is a valid indemnity agreement.
  - Duty to provide most coverage because of direct duty to AI as an insured;
  - Different for defense and indemnity?
  - Question: What if Supplementary Payments conditions are not met?
- Notice Condition
- What if policy does not comply with requirements of underlying agreement?
- Use of Staff Counsel
  - Conflict of interest;
  - Where AI endorsement contains restrictions;
  - Withdrawal of defense;
  - Implication of other trade contractors.